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Randall L. Skeen; Cook, Skeen & Robinson; Attorney for Petitioner/Appellee.

Recommended Citation
Brief of Appellee, *Bounthay Saysavanh v. Meg McGary Saysavanh*, No. 20050803 (Utah Court of Appeals, 2005).
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IN THE UTAH COURT OF APPEALS

BOUNTHAY SAYSAVANH Petitioner and Appellee, v. MEG McGARY SAYSAVANH Respondent and Appellant.	))))))))))	Case No. 20050803 District Court No. 014904542 (Judge Sandra Peuler)

APPELLEE'S BRIEF

APPEAL FROM THE THIRD DISTRICT COURT
SALT LAKE COUNTY
HONORABLE SANDRA N. PEULER

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Attorney for Respondent/Appellant

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JURISDICTION

The Court has jurisdiction pursuant to Utah Code Ann. § 78-2-2(3)(j).

STATEMENT OF THE ISSUES

1. Whether the trial court, after considering the evidence contemplated by Rule 4(e)(2) of the Utah Rules of Civil Procedure, erred in refusing to grant Respondent's Rule 60(b) Motion to Set Aside Default Judgment some two and a half years subsequent to the entry of the default given that given that Petitioner complied with Rule 4(d)(3)(A) of the Utah Rules of Civil Procedure and that Respondent had actual notice of the proceedings below during the entire pendency of the action. Although a trial court's determinations of law are given no deference, an appellate court will not upset a trial court's finding of fact unless an appellant marshals all of the evidence supporting the trial court's finding of fact and then demonstrates why such finding contradicts the clear weight of the evidence. Chen v. Stewart, 100 P.3d 1177 (Utah 2004).

2. Whether the trial court, after an evidentiary hearing in which the court stated that Respondent's witness lacked credibility, erred in denying Respondent's Rule 60(b) Motion to Set Aside Default Judgment on the grounds for fraud upon the court. Although a trial court's determinations of law are given no deference, an appellate court will not upset a trial court's finding of fact unless an appellant marshals all of the evidence supporting the trial court's finding of fact and then demonstrates why such finding contradicts the clear weight of the evidence. Chen v. Stewart, 100 P.3d 1177 (Utah 2004).

STATEMENT OF THE CASE

Nature of the case.

This case stems from a default judgment of divorce. Respondent contends that she never received service of process and that the judgment below is void for lack of personal jurisdiction. In July of 2005, some two and a half years subsequent to the entry of judgment, Respondent moved to have the default judgment set aside via her Rule 60(b) motion in which she advanced arguments addressing the issue of jurisdiction and an alleged fraud upon the court. Following briefing and hearing argument on the issue, the trial court denied Respondent's motion. In so doing the trial court heard evidence that Petitioner strictly complied with the requirements of Rule 4 and that at all times throughout the pendency of the action that Respondent had actual notice of the action yet she failed to take any measure to advocate her position. With respect to the issue of fraud, the trial court found Petitioner to be a credible witness and the Respondent's evidence to be unbelievable. Presently, notwithstanding the trial court's order, Respondent remains willfully and intentionally in contempt of court insofar as she has refused to return the minor child from Mexico. The trial court presently has a $50,000.00 contempt warrant for Respondent's arrest.

Statement of the Facts

1. In or about February of 2001, the parties separated having lived in Utah during their marriage and Respondent abruptly departed Utah for Mexico leaving the parties' minor child in Petitioner's care.

2. Thereafter for a period of approximately two years, Respondent at her

option offered only irregular periods of visitation, while at all times Petitioner acted as the child's primary custodial guardian.

3. In June of 2003, Petitioner allowed Respondent to take the child with her to Mexico for what was anticipated would be a short visit.

4. At the end of the anticipated time, Respondent failed to return the child from Mexico and instead informed Petitioner that it would be her intention to seek a court order giving her custody of the child.

5. To that end in September of 2003, Respondent retained counsel in Mexico, an individual named Omar Aguirre who provided Petitioner with his address, email address and phone number.

6. In October of 2003, Petitioner retained local counsel, Marty Olsen, to initiate divorce and custody proceedings against Respondent.

7. At all times relevant hereto, the parties remained in contact with each other via telephone, email, and U.S. mail and at all points in time relevant to the initiation of these proceedings, Petitioner advised Respondent that he had in fact initiated an action against her.

8. At all points in time relevant hereto, Petitioner's counsel advised Respondent's counsel with respect to the action pending in Utah.

9. In November of 2003, owing to Respondent's residency in Mexico, Petitioner filed a motion before Judge Peuler to have Respondent served pursuant to Rule 4(d)(3)(B)(iii) of the Utah Rules of Civil Procedure via mail. This service, reasonably calculated to give notice, is consistent with the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents.

10. Judge Peuler granted this motion and on November 4, 2003, Petitioner's counsel delivered to the Clerk of the Court, two pre-paid envelopes containing a summons, complaint and notice of an OSC hearing set for December 3, 2003. These documents were subsequently mailed to Respondent via registered and regular U.S. mail to the address that Respondent had given Petitioner as her residence. (Although below, Respondent once claimed that she never resided at this address, when faced with documentary proof of her residency she recanted this claim).

11. Respondent failed to attend the hearing on December 3, 2003 and she subsequently failed to file an Answer to Petitioner's complaint.

12. On or about December 17, 2003 the Court received the return receipt of the summons and complaint unsigned.

13. In February of 2004, Judge Peuler signed a Default Decree of Divorce. This Decree grants Petitioner custody of the minor child.

14. At all points in time relevant hereto, Petitioner has maintained contact with Respondent's family who continue to reside in Utah. During these points of contact, Respondent's family indicated to Petitioner that she was aware of the proceedings and the judgments of the Utah court. Notwithstanding these judgments, and in contempt of the trial court's order, Respondent refused to deliver the minor child and instead went into hiding thereby absconding with the minor child.

15. As a result of Respondent's actions, Petitioner was forced to initiate a multi-pronged course of action involving all branches of government in an attempt to locate Respondent and the minor child.

16. Nearly one year subsequent to the entry of the decree, Respondent elected

to retain private counsel for the purpose of combating the previously entered judgment. At no point in time, however, did Respondent deliver the child to Petitioner as ordered by the Court.

17. On or about March 4, 2005 Respondent filed her motion to set aside the default judgment. In conjunction with that motion, and notwithstanding the fact that Petitioner's paternity had never been a contested issue at any point in time during the child's life, Respondent asserted that Petitioner perpetrated a fraud upon the court by asserting his paternity on the minor child.

18. On July 27, 2006 the trial court heard oral argument and evidence with respect to Respondent's motion. At the conclusion of argument, Judge Bohling sitting as commissioner, held that the Decree of Divorce was the law of the case, that Petitioner did everything possible, including strict compliance with Rule 4(d)(3)(B)(iii), to apprise Respondent of the action, that Rule 4(d)(3)(B)(iii) was consistent with the Hague Convention, that Respondent made no effort to contact Petitioner, and that in the best interest of the child that jurisdiction was properly vested in the trial court.

19. Notwithstanding the trial court's finding, and Respondent's apparent willingness to utilize this Court's authority, Respondent has remained in blatant contempt of court by refusing to return the minor child forcing Judge Peuler to issue a $50,000.00 contempt warrant for Respondent's arrest.

SUMMARY OF ARGUMENT

The trial court made a finding of fact that Petitioner strictly and absolutely complied with Rule 4(d)(3)(B)(iii) of the Utah Rules of Civil Procedure. In making this

finding the court heard evidence consistent with that contemplated by Rule 4(e)(2). In asserting her position that the trial court erred, Respondent has utterly failed as a matter of procedure to attack this finding of fact. At no point in her brief does she marshal evidence in support of the finding before showing that the Judge's findings contravene the clear weight of the evidence. This failure should prevent this Court from overturning the trial court's finding.

With respect to Respondent's position that the trial court made an error in its legal conclusions surrounding the order allowing Petitioner to serve Respondent pursuant to Rule 4(d)(3)(B)(iii) of the Utah Rules of Civil Procedure, that assertion finds no support in the language of the rule itself. Rule 4(d)(3) lists alternative methods to serve individuals in foreign countries each of which is equally acceptable under the Rule provided that each method is reasonably calculated to give notice. The rule on its face neither privileges nor prefers one form of service over another form. At the 60(b) hearing, Judge Bohling made a finding of fact that given Respondent's conduct, no other form of service would have yielded a different result than the method allowed by Judge Peuler. And, as set forth above, because Respondent has failed to attack this finding of fact by marshaling the evidence in favor of the finding before showing that the finding offended the clear weight of the evidence, this finding should remain intact.

With respect to Respondent's assertion questioning Petitioner's paternity of the child, such assertion borders on the ridiculous: at no point in time in the child's life had Respondent or anyone else ever questioned Petitioner's paternity. It was and is universally accepted that Petitioner is the father. For Respondent to make the accusation in the trial court bordered on the bizarre. For Respondent, a woman who absconded with

the child by taking her from the primary care-giver, and who is still sitting in willful contempt of the trial court, to assert here that Petitioner has in some way perpetrated a fraud on the court with respect to his paternity is quite simply bad faith.

ARGUMENT

I. RESPONDENT HAS FAILED TO MARSHAL ANY EVIDENCE.

Respondent's failure to marshal evidence in support of the trial court's findings of fact, precludes Respondent from attacking those findings as contravening the clear weight of the evidence. Accordingly, this Court should not upset those findings. As this Court has repeatedly stated, "when an appellant fails to meet the heavy burden of marshaling the evidence, appellate courts are bound to assume the record supports the trial court's factual findings." Wade v. Stengl, 869 P.2d 9, 12 (Utah App. 1994).

In the present case, not only has Respondent failed to marshal any evidence supporting the trial court's findings, at first glance it would appear that Respondent is attempting to mislead or misdirect this Court. As a case in point, Respondent apparently would have this Court make much of the fact that Petitioner was convicted of a crime nearly a decade ago. To that end, Respondent attaches twenty-seven pages of minute entries to her brief. Why Petitioner's guilty plea to one count of criminal conduct is a point of interest in an appellate matter focusing on the technicalities of Rule 4 of the Utah Rules of Civil Procedure is anybody's guess. But it does provide an opportunity to contrast what Respondent elects to disclose with respect to the weight of the evidence. Where Respondent faithfully attached the entire list of minute entries in Petitioner's criminal case, she intentionally omitted thirteen pages of transcript from the oral argument in which Judge Bohling denied her motion to set aside the default judgment.

Those thirteen pages contained the clear weight of the evidence on which the trial court based its factual findings, and yet rather than marshaling that evidence within the body of her brief, Respondent elected to omit the full transcript. That omission amounts to misdirection and should not be rewarded by this Court. Per the holding in Wade, this Court must assume that the trial court's findings of fact that Petitioner strictly complied with the requirements of Rule 4(d)(B)(iii) are correct. Accordingly, the trial court's findings of fact should not be disturbed and this Court should affirm the lower court on this ground. And the same is true with respect to argument surrounding the acknowledgment of paternity. The Court heard evidence and did not find Respondent's evidence to be credible. Respondent's failure to marshal evidence in support of this finding precludes Respondent from attacking this finding. Accordingly, that finding should be affirmed as well.

II. THE DISTRICT COURT PROPERLY EXERCISED JURISDICTION.

Owing to Respondent's residency in Mexico, the trial court properly granted Petitioner's motion to have Respondent served via Rule 4(d)(3)(B)(iii) of the Utah Rules of Civil Procedure, and as set forth above, the trial court made a finding of fact that Petitioner strictly complied with this Rule in effecting service. Respondent has two issues with respect to this order. First, Respondent contends that Rule 4(d)(3)(B)(iii) is improper because she should have been served pursuant to the Hague Convention. Second, she contends that because the return receipt was unsigned that Petitioner failed to comply with Rule 4(e)(2). Petitioner will address those issues in turn.

Petitioner's first contention that Rule 4 requires Respondent to strictly comply with the Hague convention stems from an improper reading of Rule 4(d)(3)(A). That

Rule states: "Service in a foreign country shall be made...by any internationally agreed means reasonably calculated to give notice, such as those means authorized by the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents." The plain language of this Rule simply does not support Respondent's position. The Rule simply states that service must be effected in an internationally agreed method reasonably calculated to give notice before saying such as, or for example, those means set forth in the Hague convention. And while Respondent has set forth in her brief one internationally agreed method for effecting service in a foreign country, she has not made a showing that mailing the summons and complaint were inconsistent with internationally agreed methods. And that is a significant difference, and in fact, a body of law exists that supports the trial court's conclusion that mailing these documents is not only internationally recognized as reasonably calculated to give notice but consistent with the Hague convention.

As set forth by Respondent, The Hague Convention is a treaty that provides mechanisms by which plaintiffs can effect service on defendants in foreign countries. In candor, there exists a significant split of authorities on the issue of whether service abroad can be effected via mail. However, the Hague convention itself does not prohibit the use of postal channels to deliver judicial documents. Article 10 of the convention states:

> Provided that the State of Destination does not object, the present Convention shall not interfere with—
>
> (a) the freedom to send judicial documents, by postal channels directly to persons abroad,
> (b) the freedom of judicial officers, officials or other competent persons of the State of origin to effect service of judicial documents directly through the

judicial officers, officials, or other competent persons of the State of destination,

(c) the freedom of any person interested in a judicial proceeding to effect service of judicial documents directly through the judicial officers, officials, or other competent persons in the Sate of destination.

Although apparently no Utah courts have weighed the issue of as to whether Rule 4 permits service to be effected in Mexico via mail, a large number of courts in this country have concluded that service can be properly effected via postal channels. In reaching this conclusion, these courts have simply looked to determine whether the forum state authorizes such service and then whether the State of destination objects to such service. Denlinger v. Chinadotcom, 2 Cal. Rptr. 3d (Cal. App. 6th Dist. 2003) provides a cogent example of cases decided in this vein. In that case, the court concluded after reviewing a number of supplemental documents related to the Convention itself that allowing service of process by mail promoted a smooth and efficient international legal system. And that insofar as the Convention dealt solely with the issue of service of process, as opposed to merely the delivery of legal documents mailed subsequent to service, that the Convention did not prohibit service via mail. And a large number of courts have likewise concluded. See, Trump Taj Mahal Associates v. Hotel Services, Inc., 183 F.R.D. 173 (D.N.J. 1998) (Convention permits service by mail provided that forum state has filed no objection); Randolph v. Hendry, 50 F. Supp. 2d 572 (S.D. Va. 1999) (Articles permit service via mail even if no return receipt obtained so long as recipient country has not objected); and Brockmeyer v. May, 383 F.3d (9th Cir. 2004) (postal service permitted so long as authorized by forum State and no objection by recipient State).

In the present case, as set forth above, Rule 4 of the Utah Rules of Civil procedure clearly allows service to be effected via mail provided that such service is reasonably calculated to give a defendant notice. As set forth above, the trial court made a factual finding with respect to Petitioner's efforts to give Respondent notice and the court concluded that "Petitioner made every effort possible to apprise Respondent of the divorce proceedings including strict compliance with Rule 4(d)(3)(B)(iii) of the Utah Rules of Civil Procedure." And since Respondent has made no showing that Mexico has specifically objected to the service of process on non-citizens residing in Mexico via postal channels, Respondent cannot establish that the service of process in this case contravened the Hague Convention even were Petitioner required to adhere to such Articles.

With respect to Respondent's second point, that the absence of a signature on the return receipt amounts to a fatal defect in process, that position finds no support in Rule 4(e)(2). Without question, a signature on the return receipt amounts to one type of evidence that a court may rely on in determining whether a defendant received notice of proceedings. However Rule 4(e)(2) contemplates other evidence on its face. The Rule states:

> Proof of service in a foreign country shall be made as prescribed in these rules for service within this state or by the law of the foreign country or by order of the court. When service is made pursuant to paragraph (d)(3)(C), proof of service shall include a receipt signed by the addressee or other evidence of delivery to the addressee satisfactory to the court.

First, Respondent in this case was served pursuant to (d)(3)(C), rather, she was served pursuant to (d)(3)(B)(iii), that section carries no requirement of a signed return receipt, (see, also Randolph v. Hendry, *supra*, as an example where process still found

valid even where return receipt left unsigned). And second, during briefing and argument, the trial court heard ample evidence of the efforts Petitioner made to apprise Respondent of the action. This evidence included evidence that at all times throughout Respondent had actual notice of the proceedings and that rather than respond to that notice she simply chose to thumb her nose at the authority of the courts in this jurisdiction. The trial court heard this evidence and made the finding that Petitioner did everything possible to give notice. Certainly the phrase "everything possible" falls within the scope of "reasonably calculated to give notice."

III. PETITIONER PERPETRATED NO FRAUD ON THE COURT.

As set forth above, Respondent's failure to marshal the evidence in this case precludes her from attacking the trial court's findings of fact. But in any event it is well settled that there exists an inordinately high standard to establish actual fraud, including a showing that an actual deception has taken place. Republic Group Inc. v. Won-Door Corp, 883 P.2d 285 (Utah App. 1994). At the trial court, Petitioner offered evidence that the court found credible that in signing the Affidavit for Voluntary Declaration of Paternity, that Petitioner simply followed the instructions of the individuals working at the Bureau of Vital Statistics and that no fraud on the court occurred. Moreover, the overwhelming weight of the evidence, including a finding by the Court that Respondent's witness was not credible, indisputably demonstrated that Petitioner is in fact the father of the minor child. Accordingly, the Court should not disturb the trial court's finding of fact with respect to this issue.

CONCLUSION

For the reasons set forth above, Petitioner respectfully requests this Court to affirm the trial court's ruling denying Respondent's Motion to Set Aside the Default Decree of Divorce.

DATED this 1ST day of May, 2006.

COOK, SKEEN & ROBINSON

RANDALL L. SKEEN
Attorney for Petitioner/Appellee

CERTIFICATE OF SERVICE

The foregoing Appellees's Brief was mailed to Clayne I. Corey at PO Box 902195, Sandy, Utah 84090-2195 on this 1 day of May, 2006.

SECRETARY

Exhibit 1

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IN THE DISTRICT COURT OF THE **THIRD** JUDICIAL DISTRICT

IN AND FOR **SALT LAKE** COUNTY, STATE OF UTAH

BOUNTHAY SAYSAVANH, Petitioner,	**ORDER DENYING RESPONDENT'S MOTION TO SET ASIDE DEFAULT DECREE OF DIVORCE**
vs	
MEG McGARY SAYSAVANH, Respondent	Civil No 014904542 DA Honorable Sandra Peuler Commissioner Susan Bradford

THIS MATTER having come before the Court on Respondent's Motion to Set Aside Default Decree of Divorce on the 27th day of July, 2005, before The Honorable William B Bohling, Petitioner appearing in person and by his attorney, Martin N Olsen, and Respondent not appearing in person but being represented by her attorney, Clayne I Corey, Petitioner and Respondent having proffered evidence and testimony to the Court, the Court being fully advised in the premises, and good cause appearing therefor,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED as follows

1. That Respondent's Motion to Set Aside Default Decree of Divorce be and the same is hereby denied for the following reasons:

a. That the Decree of Divorce dated February 19, 2004, signed by The Honorable Sandra Peuler is the law of the case.

b. That Judge Bohling finds that Petitioner made every effort possible to apprise Respondent of the divorce proceedings, including strict compliance with Rule 4(d)(3)(B)(iii) of the Utah Rules of Civil Procedure.

c. That Rule 4(d)(3)(B)(iii) of the Utah Rules of Civil Procedure is consistent with the provisions of the Hague Convention.

d. That Respondent made no efforts to provide Petitioner with any address or to stay in contact with Petitioner, who is the father of the parties' minor child and had been the minor child's primary caregiver for the prior three years, and Respondent moved multiple times without any notice to Petitioner.

e That jurisdiction is proper in this Court, and it does not appear appropriate or in the best interests of the minor child in this case that the Court abdicate jurisdiction and set aside its own Order.

DATED this _____ day of August, 2005.

BY THE COURT:

By: _____
SANDRA PEULER
District Court Judge

RECOMMENDATION APPROVED

_____

WILLIAM B BOHLING
Senior District Court Judge

CERTIFICATE OF MAILING

I hereby certify that on the 2nd day of August, 2005, I hand delivered a true and correct copy of the foregoing **ORDER DENYING RESPONDENT'S MOTION TO SET ASIDE DEFAULT DECREE OF DIVORCE**, to the following:

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